Supreme Court, U.S.
FILED
JUL 21 1999
OFFICE OF THE CLERK

No. 98-2022

IN THE

Supreme Court of the United States

WILBERT CORLEY,

Petitioner,

v.

CITY OF LONGVIEW, TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DARREN COLEMAN
Counsel of Record
GARY SHAVER
BOON, SHAVER, ECHOLS
& COLEMAN, P.L.L.C.
Attorneys for Respondent
P.O. Box 151040
Longview, Texas 75615
(903) 759-2200

153959

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

Table of Cited Authorities iii

A. Petitioner interjects his own hearsay testimony into the statement of the case concerning statements allegedly made to him by other City employees to show that other employees had guns at work. 1

B. Petitioner's use of hyperbole regarding Mr. Corley's concerns at his place of work misrepresents conditions at the plant. 1

Statement of the Case 2

Reasons for Denying the Writ 4

I. Corley Failed To Raise The Issue Of Protected Employment Status In The Trial Court And Has Not Preserved This Issue On Appeal. 4

II. The City Of Longview's Personnel Manual Does Not Alter Corley's Employment-At-Will Status. 5

III. Just Cause Existed For Terminating Mr. Corley's Employment With The City Of Longview. 6

Contents

Page

IV. Mr. Corley's Right To Self-Defense Does Not Include The Right To Bear Arms In Violation Of The City's Rules. 7

V. The City Of Longview Did Not Deny Mr. Corley Equal Protection Of The Law. 8

VI. The City Of Longview Did Not Deny Mr. Corley Due Process Of The Law. 9

Conclusion 14

TABLE OF CITED AUTHORITIES

Page

Cases:

Aiello v. United Air Lines, Inc., 818 F.2d 1196 (5th Cir. 1987) 5

Badgett v. Northwestern Resources Co., 818 F. Supp. 998 (W.D. Tex. 1993) 6

Bexar County Sheriff's Civil Service Commission v. Davis, 802 S.W.2d 659 (Tex. 1990) 10, 12

Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976) 10

Blackburn v. City of Marshall, 42 F.3d 925 (5th Cir. 1995) 9, 10

Board of Regents v. Roth, 408 U.S. 564 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) 10

Byars v. City of Austin, 910 S.W.2d 520 (Tex. App. — Austin 1995, writ denied) 11

City of Houston v. Anderson, 841 S.W.2d 449 (Tex. App. — Houston [1st] 1992, writ denied) 12

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) 11, 12

Cited Authorities

Page

Evans v. City of Dallas, 861 F.2d 846 (5th Cir. 1988) 10, 11

Ex parte Williams, 786 S.W.2d 781 (Tex. App. — Houston [1st Dist.] 1990) 8

Federal Express Corporation v. Dutschmann, 846 S.W.2d 282 (Tex. 1993) 10

Laird v. Shell Oil Company, 770 F.2d 508 (5th Cir. 1985) 5

Masters v. State of Texas, 685 S.W.2d 654 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 853, 106 S. Ct. 155, 88 L. Ed. 2d 128 (1985) 7

McDonald v. City of Corinth, 102 F.3d 152 (5th Cir. 1996) 11, 12

Montgomery County Hospital District v. Brown, 965 S.W.2d 501 (Tex. 1998) 10

Norris v. Housing Authority of the City of Galveston, 980 F. Supp. 885 (S.D. Tex. 1997) 6

Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972) 10

Portis v. First National Bank of Albany, 34 F.3d 325 (5th Cir. 1994) 5

Cited Authorities

Page

Schroeder v. Texas Iron Works, Inc., 813 S.W.2d 483 (Tex. 1991) 5

Simon v. United States, 891 F.2d 1154 (5th Cir. 1990) 5

Southwest Airlines Co. v. J.J. Jaeger, 867 S.W.2d 824 (Tex. App.-El Paso 1994, writ denied) 5

Spring Branch Independent School District v. Stancos, 695 S.W.2d 556 (Tex. 1985) 10

Thompson v. City of Starkville, 901 F.2d 450 (5th Cir. 1990) 9

United States v. Miller, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206 (1939) 7

Whitehead v. University of Texas Health Science Center at San Antonio, 854 S.W.2d 175 (Tex. App. — San Antonio 1993, no writ) 5, 10, 11

Statutes:

Tex. Gov't Code Ann. § 411.203 (1997) 8

TEX. PEN. CODE ANN. § 46.03(2) 8

Cited Authorities

Page

United States Constitution:

Second Amendment 7

Fourteenth Amendment 9

Texas Constitution:

Texas Constitution, Article 1, Section 23 8

Rules:

Fed. R. Civ. P. 10(b) 4

Fed. R. Civ. P. 56(c) 4

Fed. R. Evid. 804(b)(6) 1

Respondent City of Longview, Texas perceives that Petitioner's Statement of the Case contains misstatements of the facts that bear on the issues presented. In particular, the following matters misrepresent the evidence before the trial court and Court of Appeals.

A. Petitioner interjects his own hearsay testimony into the statement of the case concerning statements allegedly made to him by other City employees to show that other employees had guns at work.

These hearsay statements are used by Mr. Corley to justify his violation of a work rule prohibiting employees from carrying guns at work. Mr. Corley cites Federal Rule of Evidence 804(b)(6) in support of his position, apparently saying that the City of Longview intentionally caused these witnesses to be unavailable. That is simply not the case. These witnesses were not subpoenaed by the City of Longview; however, the City did not take any action to prevent these witnesses from testifying. The record reflects that the City of Longview asked at least one of the witnesses to appear, but she did not do so. Other than Corley's hearsay statements, there was no evidence before the grievance panel or the trial court that any other City employee has violated this work rule.

B. Petitioner's use of hyperbole regarding Mr. Corley's concerns at his place of work misrepresents conditions at the plant.

Mr. Corley fails to include in his "factual" recitation that no crime has ever been committed at his workplace, and it fails to state that no City of Longview employee working at this plant, including Mr. Corley, has ever been threatened, assaulted or robbed there.

In order to clarify what Respondent believes are the relevant facts that bear on the issues that would be before the Court if certiorari is granted, Respondent submits the following Statement of the Case.

STATEMENT OF THE CASE

On December 14, 1995, the City Council of the City of Longview, Texas, adopted a rule prohibiting City employees from carrying guns while at work or on City property. This rule was communicated to City of Longview water treatment plant operators, including Mr. Wilbert Corley, a white male, in a meeting held on May 3, 1996 by Mike Brown, Water Utility Plant Manager.

On July 23, 1997, Wilbert Corley took a hand gun to work. When Mr. Corley was confronted with this work rule violation, he admitted the gun was his. On July 26, 1997, Mr. Corley was placed on paid administrative leave by Mike Brown. On July 29, 1997, Mr. Brown sent Mr. Corley a letter advising Mr. Corley that he was recommending that Mr. Corley's employment with the City be terminated. This letter also advised Mr. Corley of his right to a pre-termination hearing. A pre-termination hearing was held with Mr. Ed Rohner, Director of Public Services. Following this hearing, Mr. Rohner determined that Mr. Corley should be discharged for violating the City's rule prohibiting employees from having guns at work, and he sent Mr. Corley a letter terminating his employment. This letter also advised Mr. Corley he had the right to appeal this decision. When he made the decision to terminate Mr. Corley, Mr. Rohner was not aware of any other City employees, regardless of race or sex, who had violated this work rule.

Mr. Corley filed a grievance with the City of Longview contesting his discharge. A grievance panel of three City employees was appointed pursuant to City policy to hear Mr. Corley's grievance. At his grievance hearing, Mr. Corley acknowledged that he had the gun at work in violation of work rules. Mr. Corley's justification for having the gun at work was that he needed it for self-defense. In the grievance process, Mr. Corley attempted to justify this rationalization by citing alleged dangerous working conditions. However, when questioned, Mr. Corley was unaware of any city employee ever having been assaulted or robbed at the Cherokee Water Treatment Plant.

Mr. Corley requested the City of Longview to provide three (3) City employees for the hearing. Kay Wilkinson, the City's Human Resources Division Manager, told Mr. Corley's attorney that it was the employee's responsibility to contact witnesses. Mr. Corley contacted these three employees and requested that they attend the hearing to testify on his behalf; however, none of them appeared at the hearing. Mr. Corley wanted these individuals to be present at the grievance hearing because he expected them to testify that they had had guns at work in violation of the work rule in question.[1] Mr. Corley testified at the hearing that he was being treated differently than other employees who had guns at work. Ron Welch, Corley's supervisor, testified that he had no knowledge of any employee, other than Corley, who had violated this rule.

---

1. Each of these three people was deposed, and they all denied ever telling Mr. Corley that they had carried or had a gun at his or her place of employment with the City of Longview. Each also denied having knowledge of any City employee who had violated this rule. This deposition testimony was presented to the trial court with the City's Motion for Summary Judgment.

During the hearing, the grievance panel asked that a city employee be asked to come to the hearing. Kay Wilkinson telephoned the employee and asked for her to come to the hearing; however, she did not appear. When asked at her deposition why she did not appear at the hearing, the employee testified that she slept through the hearing because she worked the "graveyard" shift and had "pulled a double" (worked two consecutive shifts).

Following the grievance hearing, the grievance panel voted to recommend to the City Manager that Mr. Corley's termination be upheld. Subsequently, Ted Willis, the Longview City Manager at the time, upheld Mr. Corley's termination. Mr. Corley was replaced as a water treatment plant operator by a white male.

REASONS FOR DENYING THE WRIT

I.

CORLEY FAILED TO RAISE THE ISSUE OF PROTECTED EMPLOYMENT STATUS IN THE TRIAL COURT AND HAS NOT PRESERVED THIS ISSUE ON APPEAL.

Corley complains that his employment status was modified by the City of Longview's Policies. Corley did not raise this issue in his Original Complaint. Although this issue was mentioned in his response to the City's Motion for Summary Judgment, there were no pleadings on file to support those allegations, which must be affirmatively plead. FRCP 10(b) and FRCP 56(c). As a result, the trial court quite properly did not consider these issues when it granted the City's motion for summary judgment.

Simon v. United States, 891 F.2d 1154 (5th Cir. 1990). This issue cannot be the basis for an appeal of the trial court's decision. *Laird v. Shell Oil Company*, 770 F.2d 508, 511 (5th Cir. 1985), and *Portis v. First National Bank of Albany*, 34 F.3d 325, 331 (5th Cir. 1994).

II.

THE CITY OF LONGVIEW'S PERSONNEL MANUAL DOES NOT ALTER CORLEY'S EMPLOYMENT-AT-WILL STATUS.

Texas adheres to the employment-at-will doctrine that gives the employer the right to terminate an employee with or without cause unless the employee's status is altered by contract. *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483 (Tex. 1991). The burden is on the employee to establish that he is covered by a contract of employment. *Southwest Airlines Co. v. J.J. Jaeger*, 867 S.W.2d 824 (Tex. App.-El Paso 1994, writ denied). While an employee handbook can become part of an employment contract and limit an employer's right to terminate an employee, it must specifically and expressly limit the employment relationship and curtail the employer's right to terminate the employee. *Whitehead v. University of Texas Health Science Center at San Antonio*, 854 S.W.2d 175 (Tex. App. — San Antonio 1993, no writ). The language cited by Mr. Corley allows termination for "just cause," but it does not restrict the City from terminating him for other reasons. Thus, this case is distinguishable from *Aiello v. United Air Lines, Inc.*, 818 F.2d 1196 (5th Cir. 1987).

III.

JUST CAUSE EXISTED FOR TERMINATING MR. CORLEY'S EMPLOYMENT WITH THE CITY OF LONGVIEW.

Even assuming Mr. Corley's employment-at-will status was modified, his appeal is still without foundation. There is no dispute that Mr. Corley was aware of the City's rule against employees having guns at work. He intentionally violated that rule, and that was the reason given for his termination. Just cause, if required, existed for his termination, as violation of a clearly articulated, and communicated, work rule constitutes just cause for termination. In the case of *Badgett v. Northwestern Resources Co.*, 818 F. Supp. 998 (W.D. Tex. 1993), the court determined that "good cause" for termination included violation of the employer's attendance and safety policies. Similarly in *Norris v. Housing Authority of the City of Galveston*, 980 F. Supp. 885 (S.D. Tex. 1997), insubordination was held to be "good cause" warranting an employee's dismissal under an employment contract requiring good cause for termination. Because Mr. Corley willfully violated a work rule intended to make the work place safer, his termination is justified under both the *Badgett* and *Norris* decisions.

IV.

MR. CORLEY'S RIGHT TO SELF-DEFENSE DOES NOT INCLUDE THE RIGHT TO BEAR ARMS IN VIOLATION OF THE CITY'S RULES.

Mr. Corley's justification for having a gun at work was that he was concerned for his safety. Unilaterally determining that the conditions at the Cherokee Water Treatment Plant were unsafe, Mr. Corley intentionally disregarded the City's rules prohibiting employees from having guns at work. Since his discharge from City employment, Mr. Corley contends that this action violated his right to bear arms in self-defense. The irony is that the rule he violated was promulgated by the City to make Mr. Corley's workplace safe.

The Second Amendment to the United States Constitution does not provide an individual with an unlimited right to carry weapons. Indeed, the right to carry a handgun unrelated to a "well regulated militia" does not exist. *United States v. Miller*, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206 (1939). Illustrative of this rule of Constitutional interpretation is the case of *Masters v. State of Texas*, 685 S.W.2d 654 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 853, 106 S. Ct. 155, 88 L. Ed. 2d 128 (1985). In *Masters*, the Texas Court of Criminal Appeals cited long-standing authority for the position that the Second Amendment does not apply to the states or their subdivisions. *Masters* at 655. Clearly, therefore, the Second Amendment to the United States Constitution did not preclude the City of Longview from adopting its rule prohibiting employees from carrying guns on City premises.

Similarly, the Texas Constitution, Article 1, Section 23, does not preclude the City's regulation of fire arms. *Ex parte Williams*, 786 S.W.2d 781 (Tex. App. — Houston [1st Dist.] 1990), as Tex. Gov't Code Ann. § 411.203 (1997) authorizes public employers to adopt rules prohibiting persons from carrying concealed handguns on the premises of the employer.

Mr. Corley argues that the water treatment plant was under his control, thus he was entitled to have a handgun there to protect himself. The "control" did supercede the authority of its owner, and his employer, to regulate handguns on its premises. The authorities supporting the right of self-defense asserted by Mr. Corley are merely a defense to a criminal charge. TEX. PEN. CODE ANN. § 46.03(2). The privilege of carrying a gun does not exist as a "right" or "privilege" for an employee to assert to vitiate the effects of his employer's work rules.

V.

THE CITY OF LONGVIEW DID NOT DENY MR. CORLEY EQUAL PROTECTION OF THE LAW.

The City of Longview's grievance process did not deny Mr. Corley equal protection of the law. The summary judgment evidence considered by the trial court was conclusive that the City of Longview *never* subpoenaed witnesses for an employee grievance proceeding for any employee, regardless of the race or sex of the employee. Even using the strict scrutiny standard, there is no basis for Mr. Corley's proposition. Mr. Corley was treated just like every other employee, regardless of race or sex, who has filed a grievance with the City of Longview. The City's grievance process did not target a suspect class that includes Mr. Corley.

Mr. Corley's claim is that he was denied an individual right that resulted in his being treated differently. This argument does not state a claim that the process used was in violation of this equal protection rights. *Thompson v. City of Starkville*, 901 F.2d 450 (5th Cir. 1990). If anything, this argument asserts the deprivation of due process rights. However, as addressed in the next section of this brief, Mr. Corley was afforded all the due process required by law.

It is not a violation of Mr. Corley's rights to equal protection to terminate his employment for violating a precise non-discriminatory work rule, as that the City of Longview would treat any person who violated this policy exactly as it did Mr. Corley. The policy itself is not directed towards any race or sex. The City had a legitimate public safety interest in reducing the possibility of violence in the workplace. The reduction of the possibility of violence in the workplace is job-related and not based on any discriminatory animus. Mr. Corley's supervisors have never had any other person reported to them for violations of the policy in question. Thus, his race and sex are really nonissues in this analysis. For that reason, Mr. Corley's equal protection challenge must fail.

VI.

THE CITY OF LONGVIEW DID NOT DENY MR. CORLEY DUE PROCESS OF THE LAW.

When a litigant asserts a cause of action for violation of due process, it is his obligation to first identify a life, liberty, or property protected by the Fourteenth Amendment, and then identify the state action that caused the deprivation of that interest. *Blackburn v. City of Marshall*, 42 F.3d 925

(5th Cir. 1995); *See also Board of Regents v. Roth*, 408 U.S. 564 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). In this case, Mr. Corley asserts that he had a property interest in this job. Then he alleges that the procedural safeguards in his grievance hearing were inadequate in that the City refused to subpoena City employees as witnesses for him. In making these allegations, Plaintiff assumes that he had a property interest in his employment that entitled him to this protection.

Property interests in employment do not arise directly from the Constitution, but are determined from state law. *Montgomery County Hospital District v. Brown*, 965 S.W.2d 501, (Tex. 1998); *Evans v. City of Dallas*, 861 F.2d 846 (5th Cir. 1988); and *Bishop v. Wood*, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976). Absent an agreement to the contrary, employment in Texas is at-will, terminable at any time, with or without cause. *Federal Express Corporation v. Dutschmann*, 846 S.W.2d 282 (Tex. 1993). Under Texas law, an at-will employee has no protected property interest in continued employment. *Whitehead v. University of Texas Health Science Center at San Antonio, supra. See also Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). Since the protections of procedural due process apply only to a threatened deprivation of a liberty or property interest, an at-will employee with no vested interest in continued employment, such as Mr. Corley, is not entitled to those safeguards. *Spring Branch Independent School District v. Stancos*, 695 S.W.2d 556 (Tex. 1985), and *Bexar County Sheriff's Civil Service Commission v. Davis*, 802 S.W.2d 659 (Tex. 1990). Although the City of Longview extended the right to a hearing to Mr. Corley, the extension of this procedure does not of itself create a property interest in the employee's

job. *Byars v. City of Austin*, 910 S.W.2d 520 (Tex. App. — Austin 1995, writ denied). *See also Evans v. City of Dallas*, *supra*.

Assuming that Mr. Corley had some property interest in his employment, the process afforded him by the City of Longview satisfied all procedural due process requirements. In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), the Supreme Court determined that the essential requirements of due process are notice and an opportunity to respond at a meaningful time. 470 U.S. at 546. Amplifying on this issue in a little more detail, the San Antonio Court of Appeals stated that pretermination notice and opportunity to respond, coupled with post termination administrative proceeding are all the due process to which an employee with a constitutionally protected employment interest is entitled. *Whitehead v. University of Texas Health Science Center at San Antonio*, 867 S.W.2d at 182. The summary judgment evidence in this case revealed that Mr. Corley had ample notice of the charges against him. In fact, he admitted the truth of the charges. In addition to arguing that he had a right to violate his employee's rule, Mr. Corley challenges the process followed by the City in his appeal of the decision to terminate his employment. He argues that the process was fatally flawed because the City did not compel witnesses to attend on his behalf. As discussed below, the requirements of due process do not compel an employer to subpoena witnesses for a terminated employee.

In the case of *McDonald v. City of Corinth*, 102 F.3d 152 (5th Cir. 1996), the Court of Appeals determined that a city's failure to inform an employee that he had the right to call and cross-examine witnesses did not constitute a

violation of his civil rights. Mr. Corley was advised of these rights, and he exercised them, yet he wants to stretch the limits of due process beyond the point denied by the Court in *McDonald.*

Further illustrating the limits of due process is the Texas Supreme Court case of *Bexar County Sheriff's Civil Service Commission v. Davis*, 802 S.W.2d 659 (Tex. 1990), in which that Court held that an employee was not entitled to names of complaining witnesses against him. Relying on the *Loudermill* decision, the Texas Supreme Court reasoned:

> The notice actually provided to Davis, along with the rights granted him to confront and cross-examine the government's witnesses and *to present his own witnesses*, guaranteed that all relevant matters were adequately presented for consideration by the decision-making body.

Davis, at 663. [Emphasis added.] The Texas Supreme Court determined that Davis (the employee in that case) was given ample opportunity to present his case, including calling his own witnesses. For a similar result, *see City of Houston v. Anderson*, 841 S.W.2d 449 (Tex. App. — Houston [1st] 1992, writ denied).

The City of Longview attempted to comply with Mr. Corley's request to provide city employees as witnesses. During the hearing, Kay Wilkinson, the City's Human Resources Manager, called one of the employees and asked her to come to the hearing. She responded that she had worked double shifts and was too tired to come to the hearing. Her failure to attend the hearing does not render the process inadequate. It was the employee's choice, not

that of the City of Longview, to not go to the hearing. There is no indication that the City prevented Mr. Corley from presenting witnesses. Instead, Mr. Corley wants to impose an additional burden on his employer to bring his witnesses to the hearing for him. Due process does not impose such a burden on public employers and should not be so extended here.

Unlike many such cases, the issues raised here, although novel in some instances, are not difficult to resolve. As a City employee, Mr. Corley was obliged to follow his employer's legitimate rules. He chose not to do so. In the process that followed, the City of Longview gave Mr. Corley ample opportunity to grieve his termination. Quite naturally, in view of his obvious violation of the City's rule, Mr. Corley's discharge from the City's employment was sustained throughout the grievance process. This act alone does not demonstrate discrimination, yet this "evidence" is all that Mr. Corley presents to the Court.

CONCLUSION

For the reasons given above, the City of Longview, Texas requests the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

DARREN COLEMAN
Counsel of Record
GARY SHAVER
BOON, SHAVER, ECHOLS
& COLEMAN, P.L.L.C.
Attorneys for Respondent
P.O. Box 151040
Longview, Texas 75615
(903) 759-2200